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No. 82-1175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,
Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,
Appellee.

On Appeal From The Supreme Court Of Wisconsin

MOTION TO AFFIRM DECISION BELOW-INSUBSTANTIALITY

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MOTION TO AFFIRM

Appellee, under Rule 16.1(d) of the Rules of the Supreme Court of the United States, moves that the final order of the Wisconsin Supreme Court, dated October 11, 1982, denying review of the Wisconsin Court of Appeals' affirmation of the Dane County Circuit Court's dismissal of the appellant's complaint, should be affirmed on the ground that said disposition by the Wisconsin Supreme Court is so obviously correct under the holding in *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978), as to warrant no further review by this Court.

OPINION BELOW

The opinions and orders of the Wisconsin trial and appellate courts are set forth in Appendix A of the appellant's jurisdictional statement.

JURISDICTION

Appellant has invoked jurisdiction of this Court under 28 U.S.C. §1257(2) on page 2 of his jurisdictional statement.

STATEMENT

Appellee takes issue with the statement of the case in appellant's jurisdictional statement as follows:

1. Appellant has admitted in the Wisconsin courts, in his complaint, briefs and arguments therein:

a. That he is not only a resident of Minnesota but also that he is domiciled in Minnesota;

b. That a state may require nonresident hunting licenses;

c. That a state has "great latitude" within its police power to protect wildlife under *Baldwin*, 436 U.S. at 391.

2. Appellant is domiciled in Minnesota and mere ownership of recreational land in Wisconsin does not subject him to the general taxing authority of Wisconsin

ARGUMENT

The privileges and immunities clause of the fourth and fourteenth amendments to the United States Constitution are not offended herein because this Court has declared that a state does not abridge a

"fundamental right" of federal or state citizenship when it charges nonresidents a higher big game hunting license fee than residents. In *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 388 (1978), this Court held:

> We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

The fact that a nonresident, non-domiciliary owns real estate in the state requiring higher nonresident big game license fees does not invoke the privileges and immunities clauses. In *Baldwin*, 436 U.S. at 387, this Court stated:

> [T]he Court dismissed for the want of a substantial federal question an appeal from a decision of the Supreme Court of South Dakota holding that the *total* exclusion from that State of nonresident hunters of migratory waterfowl was justified by the State's assertion of a special interest in wildlife that qualified as a substantial reason for the discrimination. *State v. Kemp*, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951). In that case South Dakota had proved that there was real danger that the flyways, breeding grounds, and nursery for ducks and geese would be subject to excessive hunting and possible destruction by nonresident hunters lured to the State by an abundance of pheasants. 73 S.D., at 464, 44 N.W.2d, at 217.

If a state can completely ban nonresident hunting of certain species of game without presenting a substantial federal question to this Court, the distinction between a nonresident real property owner and nonresident who does not own property becomes meaningless herein in a constitutional sense.

The equal protection clause of the fourteenth amendment to the United States Constitution is not offended because this Court has declared that a state under its police power can classify hunting fees for residents and nonresidents within a rational plan for the preservation of a finite natural resource. In *Baldwin*, 436 U.S. at 390, 391, this Court held:

> All this adds up, in our view, to no irrationality in the differences the Montana Legislature has drawn in the costs of its licenses to hunt elk. The legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State. ... But, as has been noted, appellants concede that a differential in cost between residents and nonresidents is not in itself invidious or unconstitutional. And "a statutory classification impinging upon no fundamental interest ... need not be drawn so as to fit with precision that legitimate purposes animating it. ... That [Montana] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794, 813, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976).

....

> We perceive no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, non-livelihood setting. Rationality is sufficient. That standard, we feel, has been met by Montana. So long as constitutional requirements have been met, as we conclude is the case here, "[p]rotection of the wild life of the State is particularly within the police power, and the State has great latitude in determining what means are appropriate for its protection." *LaCoste v. Depart. of Conservation,* 263 U.S. 545, 552, 44 S.Ct. 186, 189, 68 L.Ed. 437 (1924).

Big game is a finite resource in Wisconsin and is limited to two types of animals, whitetail deer and black bear. Other big game, such as moose and buffalo, were driven from Wisconsin over 100 years ago by settlement. In fact, Wisconsin's deer herd was threatened in the 1920's by the pressures of settlement, hunting and the disappearance of proper habitat so that in the 1930's, deer hunting was permitted only every other year.

Proper game management of whitetail deer and black bear recognizes, among a host of other variables, the importance of maintaining proper habitat and the regulation of human pressures in order to preserve a healthy, viable and valuable natural resource — big game animals in Wisconsin. Wisconsin's big game situation follows.

*Black Bear.** In 1980, the black bear population was approximately 5,000, located exclusively in the dozenmost northern counties of Wisconsin. Eight hundred were taken by hunting in 1980. Bayfield and Douglas Counties were the number one and two bear kill counties in 1980.

Unlike whitetail deer, bear require wild and isolated habitat for survival. Hunting success in 1980 is consistent with this habitat need. Bayfield and Douglas Counties, which are contiguous, provide some of the wildest tracts of land in the state. Much of this land is managed by public agencies, states, state-county, and federal. Habitat, thus, limits the black bear range to the wildest land in the state — land which today is found only in the most northern counties.

*Whitetail Deer.** In 1980, the whitetail deer population stood at about 800,000 and said animal occurred in every county of the state. In 1930, the deer population was less than 300,000 and was confined to the northern one-third of Wisconsin. Proper management of habitat and the deer herd the past fifty years have made whitetail deer hunting readily available to hunters in all counties despite a dramatic rise in hunting pressure detailed in the following chart:

YEAR	DEER HERD	RESIDENT DEER HUNTING LICENSES — ALL SOURCES, GENERAL, SPORTSMAN, ARCHER, ETC.	NON-RESIDENT DEER HUNTING LICENSES — ALL SOURCES, GENERAL, ARCHER, ETC.
1930	Less than 300,000	77,284	Not Available
1940	600,000	105,056	Not Available
1950	600-800,000	309,455	5,516
1960	600-800,000	335,238	6,909
1970	600-800,000	582,606	22,766
1980	800,000	754,572	19,147

*From public records at the Department of Natural Resources, State of Wisconsin.

The chart shows a clear trend. More people are hunting whitetail deer each decade and the Wisconsin deer herd is a finite resource, having stabilized at about 800,000 animals. In fact, in 1980, one deer license was sold for each deer in the total herd. If this upward trend continues through the next decade, the game managers may be required to alter the license structure to preserve the herd. At the present time, hunter success of one in five plus the variables of habitat, weather, reproduction, etc., keep the herd stable from year to year. As noted, these conditions may change in the future, requiring different licensing based on annual game management evaluations — *e.g.*, a lottery system for issuing licenses and banning nonresident hunting entirely.

Appellant argues that the resident-nonresident licensing law is not regulatory in nature but merely an income producing scheme because no limits are placed on the number of licenses sold and such unlimited sales lead to depletion of the big game natural resource.

Appellant's argument is short-sighted. Wisconsin big game management involves more than just license sales. It includes bag limits, season limits, sex limits, zone limits, age limits and host of other regulatory devices to control hunting. Licensing is just one regulatory tool available in game mangement. As mentioned previously, if hunting big game in Wisconsin continues its upward trend in the future, license sales limits or lotteries or prohibitions on hunting may be required for certain years, for certain areas or persons.

Appellant is not subject to the general taxing authority of Wisconsin. In Wisconsin, real property tax liability is local. That is, real property taxes are collected by the counties, cities, towns and villages and disbursed by said municipalities to pay for local

government expenses and services. Said expenses and services for the most part involve local road repair and maintenance, local police and fire protection to persons and property, local water, sewer and waste disposal and local schools.

The appellant, as a real property owner, pays for and enjoys ready access to his property in all seasons through local road maintenance, and has the benefit of local police and fire protection for his Wisconsin property even while he resides in Minnesota. The happenstance that local road maintenance, local police and fire protection may aid incidently big game hunting cannot be persuasive herein. The main purpose of local property taxes is to provide direct municipal services for the protection and enjoyment of real property owners located in the particular municipality. Finally, local real property taxes are not used to fund state game management programs.

The general taxing authority pays all the incidents of big game hunting in Wisconsin. That is, the "general taxing power" of the state is imposed on its residents day after day throughout the year, whereas nonresidents are subject to only bits of the taxing power of the state — *e.g.*, sales and gasoline taxes while in the state and local property taxes if real estate is owned by nonresidents. Residents, on the other hand, pay not only real estate taxes, sales taxes and gasoline taxes all year, but also state income taxes, state excise taxes and the whole bundle of other state taxes imposed throughout the year. Monies collected from these resident tax sources finance big game habitat and management in Wisconsin.

The following is a non-exclusive list of resident tax sources:

1. The conservation fund, sec. 25.29, Wis. Stats., includes many tax sources — hunting and fishing

license fees, forest income, park income, other licenses, snowmobile licenses, boating fees, forest taxes, sales taxes on boats and snowmobiles, federal taxes collected and returned by formulas (like federal waterfowl stamps and gun and ammunition sales in Wisconsin). Appropriations from the conservation fund are set forth in sec. 20.370, Wis. Stats.

2. Forest Crop Law, sec. 77.02, Wis. Stats. State pays civil towns monies for lands entered into forest crop program in recognition of lost local tax revenues.

3. Outdoor Recreation Program (ORAP), sec. 23.30, Wis. Stats. Funds secured from bonding and general taxes, income and inheritance.

4. Pittman-Robertson Act, 16 U.S.C. §669. Federal funds matched to those appropriated from ORAP and the conservation fund.

5. State interest-free loans to encourage establishment of county forests. Sec. 28.11, Wis. Stats.

6. Operations-wardens', game managers', administrators' salaries and benefits. Secured from conservation fund and general tax revenues, income, sales and inheritance.

The appellant also argues discrimination in nonresident licensing as a real property owner in Wisconsin under secs. 29.09(12) (a) and 29.109(2), Wis. Stats.

Section 29.09(12) (a), Wis. Stats., permits nonresident members of the armed forces, nonresident college students and foreign high school and university short course students to secure resident deer licenses.

Section 29.109(2), Wis. Stats., permits nonresident members of the armed forces to secure resident bear hunting permits while stationed in Wisconsin.

The appellant apparently missed the permissive constitutional distinction set forth in *Baldwin*, 436 U.S. at 388-90. That is, although the persons mentioned in the above statutes are nonresidents, they are, however, residents in fact subject to the "general taxing power" of the state because they are full-time residents of the state for tax purposes, at least while attending school or while stationed in Wisconsin. They must pay state income taxes, state excise taxes, state sales and gasoline taxes, etc., all year. Some also even pay local property taxes and personal property taxes. Therefore, for all practical purposes, the above-described persons are residents for tax purposes and are recognized as such for big game hunting purposes.

In his legal argument, the appellant takes issue with the statutory exceptions to sec. 29.01(8), Wis. Stats., which define the term "resident." Sections 29.09(12) (a) and 29.109(2), Wis. Stats., allow certain nonresidents to secure resident deer and bear hunting licenses. The appellant's argument only makes sense if it is read as an attack on the constitutionality of those exceptions. However, even if the exceptions were constitutionally invalid, their invalidity would not affect sec. 29.01(8), Wis. Stats., or the entire resident-nonresident sport licensing structure of Wisconsin. The appellant still would be a nonresident of Wisconsin by his own admission, as would those persons mentioned in secs. 29.09(12) (a) and 29.109(2), Wis. Stats. (in the event those sections were declared invalid).

The appellant thus argues not that sec. 29.01(8), Wis. Stats., denies him equal protection, but rather that secs. 29.09(12) (a) and 29.109(2), Wis. Stats., deny him equal protection. The plaintiff cannot argue the former because *Baldwin* declares that classification of residents and nonresidents sport hunters under a statute like sec. 29.01(8), Wis. Stats., is permissible under the equal protection clause. As to the latter

argument, if the appellant indeed makes the latter argument and if he were successful, his nonresident status still would not have changed. He merely would have succeeded in invalidating secs. 29.09(12) (a) and 29.109(2), Wis. Stats., without changing his status. Under this view, the appellant really has no claim herein and has no standing to challenge the exceptions to sec. 29.01(8), Wis. Stats.

Appellee respectfully submits, therefore, that this Court's decision in *Baldwin* clearly is dispositive of the questions presented by this appeal, and that the October 11, 1982, order of the Wisconsin Supreme Court should be affirmed without further review by this Court.

Respectfully submitted,

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